Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 18 FEBRUARY 15, 1984 No. 7

This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Part 177

(T.D. 84-35)

Change of Practice Relating to Tariff Classification of Thread Seal Tape Made of "Teflon"

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document gives notice of a change in the current uniform and established practice in the tariff classification of merchandise which is a nonfibrous, nonlaminated, nonreinforced, continuous form plastic tape made of polytetrafluoroethylene ("teflon" fluorocarbon resin). The merchandise is also known as thread seal tape made of "teflon", and is currently classified under the tariff provision for articles not specially provided for, of rubber or plastics, other. This change of practice will result in the classification of future importations of the subject merchandise under the provision for strips (in continuous form), whether known as artificial straw, yarns, or by any other name, not laminated, at a higher rate of duty than was previously assessed.

EFFECTIVE DATE: May 1, 1984.

FOR FURTHER INFORMATION CONTACT: Phil Robins, Classification and Value Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8181).

SUPPLEMENTARY INFORMATION:

Background

This document pertains to the tariff classification of merchandise which is a nonfibrous, nonlaminated, nonreinforced, continuous form plastic tape made of polytetrafluoroethylene ("teflon" fluorocarbon resin). The merchandise is also known as thread seal tape made of "teflon".

On June 6, 1983, a notice was published in the Federal Register (48 FR 25224) advising that Customs was reviewing its practice of

classifying thread seal tape made of "teflon" under the provision for articles not specially provided for, of rubber or plastics, other, in item 774.55, Tariff Schedules of the United States (TSUS; 19 U.S.C. 1202). As part of its review, Customs requested comments on its proposal to classify future importations of the subject merchandise under the provision for strips (in continuous form), whether known as artificial straw, yarns, or by any other name, not laminated, in item 309.20 and item 309.21, TSUS, depending on its value per pound. Comments were to have been received on or before August 5, 1983.

Discussion of Comment

The writer of the only comment received in response to the notice, an importer of "teflon" thread seal tape, did not believe the subject merchandise "should be considered as a fibrous material." Customs notes that Headnote 2(a), Subpart 1E, Schedule 3, TSUS, states that the term "man-made fibers" refers to, among other things, strips, and Headnote 2(b) of that subpart provides that strips may be formed by extrusion or other processes. Since the term "strips" is defined in Headnote 3(d) of Subpart 1E in terms of dimensional requirements and the court has stated in *Le Jeune, Inc. v. United States,* 67 Cust. Ct. 301, C.D. 4289 (1971), that Congress intended form rather than use should govern the classification of man-made fibers, it does not appear that whether or not the subject merchandise is a fibrous material is a valid consideration in determining its classification as man-made fiber strips.

Change of Practice

After consideration of the comment and further review of the matter, Customs has determined that the established and uniform practice of classifying thread seal tape made of "teflon" as articles not specially provided for, of rubber or plastics, other, in item 774.55, TSUS, at a current Column 1 rate of duty of 6.9 percent ad valorem, is clearly wrong and should be changed. It is Customs position that if the merchandise meets the dimensional requirements set out in Headnote 3(d), Subpart 1E, Schedule 3, TSUS, it should be classified under the provision for strips (in continuous form), whether known as artificial straw, yarns, or by any other name, not laminated, in item 309.20 and item 309.21, TSUS, depending on its value per pound. Item 309.20, TSUS, which applies to strips valued not over $1 per pound, currently provides a Column 1 rate of duty of 10¢ per pound, while item 309.21, TSUS, which applies to strips valued over $1 per pound, currently provides a Column 1 rate of duty of 10.5 percent ad valorem. Accordingly, the change of practice is adopted as proposed.

DRAFTING INFORMATION

The principal author of this document was James S. Demb, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

ALFRED R. DE ANGELUS,
Acting Commissioner of Customs.

Approved: January 12, 1984.
JOHN M. WALKER, Jr.,
Assistant Secretary of the Treasury.

[Published in the Federal Register, February 1, 1984 (49 FR 3986)]

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19 CFR Part 4

(T.D. 84-36)

Customs Regulations Amendment Relating to the Prevention of Pollution by Oceangoing Vessels

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Interim Regulations.

SUMMARY: This document amends the Customs Regulations relating to the prevention of oil pollution by oceangoing vessels. It permits a district director of Customs, upon the request of the Coast Guard, to refuse or revoke the clearance or permit to proceed of a vessel until otherwise notified by the Coast Guard. The document will enable Customs to implement the provisions of the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973. This action will protect and preserve the marine environment by reducing the amount of oily wastes discharged into the sea by oceangoing vessels of the U.S., and those of foreign countries within the navigable waters of the United States.

EFFECTIVE DATE: February 1, 1984.

COMMENTS: The amendment is being published as an interim regulation, effective on (date of publication in the Federal Register). However, written coments received on or before (60 days after publication in the Federal Register) will be considered in determining whether any changes to the regulation are required before a permanent rule is published.

ADDRESS: Comments (preferably in triplicate) should be addressed to the Commissioner of Customs, Attention: Regulations Control Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: John Mathis, Carriers, Drawback and Bonds Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202–566–5706).

SUPPLEMENTARY INFORMATION:

BACKGROUND

The Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL Protocol) was established to protect the marine environment from pollution caused by the discharge of oil from "oceangoing" vessels. The term "oceangoing" refers to those vessels not operating exclusively on the Great Lakes which are certified for oceans or coastwise service beyond 3 miles from land. The MARPOL Protocol has already been ratified by the United States and entered into force on October 2, 1983. It requires oceangoing ships of the United States, and those of foreign countries within the navigable waters of the United States, to comply with the preventive provisions contained in the Protocol. The provisions include requirements for the installation of oily-water separating equipment for ships over 400 gross tons, the carrying on board of an International Oil Pollution Prevention [IOPP] Certificate, maintaining a MARPOL Oil Record Book, and observing the limitations on the operational discharge of oil.

The Secretary of Transportation, acting through the U.S. Coast Guard, will administer and enforce the provisions of the MARPOL Protocol. Pursuant to the Act to Prevent Pollution from Ships, 1980, (Pub. L. 96–478, 33 U.S.C. 1901–1911), the Secretary of Transportation may prescribe any necessary or desired regulations to implement the provisions of the MARPOL Protocol.

The Secretary of the Treasury, acting through Customs, and upon request of the Secretary of Transportation, will also administer and enforce the provisions of the MARPOL Protocol. Specifically 33 U.S.C. 1904(f) provides that the Secretary of the Treasury may refuse or revoke the clearance or permit to proceed of a vessel under a detention order (33 U.S.C. 1904(e)) if requested to do so by the Secretary of Transportation.

So that Customs may directly and efficiently implement the provisions of the MARPOL Protocol, Part 4, Customs Regulations, is being amended by adding a new section 4.66c. The new section provides that if a district director of Customs receives a notification from a Coast Guard officer that an order has been issued to detain a vessel required to have an IOPP Certificate, either because the vessel does not have a valid certification on board, or because the condition of the ship's equipment does not agree with the particulars of the certificate on board, the district director shall refuse or revoke the clearance or permit to proceed to the vessel if requested to do so by the Coast Guard officer. The district director shall not grant clearance or issue a permit to proceed to the vessel until no-

tified by a Coast Guard officer that detention of the vessel is no longer required.

New section 4.66c additionally will provide that a district director shall, upon request by a Coast Guard officer, refuse or revoke the clearance or permit to proceed of a vessel, if the vessel, its owner, operator, or person in charge is liable for a fine, or reasonable cause exists to believe that they may be subject to a fine under the provisions of (1) 33 U.S.C. 1908 for violating the MARPOL Protocol, (2) the Act to Prevent Pollution From Ships, 1980 (33 U.S.C. 1901–1911), or (3) regulations issued thereunder. The district director may grant clearance or a permit to proceed upon notification that a bond or other security satisfactory to the Coast Guard has been filed.

COMMENTS

Before adopting the regulation as a permanent rule, consideration will be given to any written comments timely submitted to the Commissioner of Customs. Comments submitted will be available for public inspection in accordance with section 103.11(b), Customs Regulations (19 CFR 103.11(b)), on normal business days between the hours of 9:00 a.m. to 4:30 p.m. at the Regulations Control Branch, Customs Service Headquarters, Room 2426, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

INAPPLICABILITY OF NOTICE AND DELAYED EFFECTIVE DATE REQUIREMENTS

Because the MARPOL Protocol has already been ratified by the United States and entered into force on October 2, 1983, the amendment enabling Customs to implement its provisions is an immediate necessity in order to protect the marine environment from further oil pollution from oceangoing vessels. Therefore, it has been determined that, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure are impracticable, unnecessary and contrary to the public interest. For the same reasons, Customs has determined that good cause exists for dispensing with a delayed effective date pursuant to 5 U.S.C. 553(d)(3).

EXECUTIVE ORDER 12291

It has been determined that this amendment is not a "major rule" within the criteria provided in section 1(b) of E.O. 12291, and therefore no regulatory impact analysis is required.

REGULATORY FLEXIBILITY ACT

Although Customs does not believe that this amendment will have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act (5 U.S.C. 601–612), we will continue to review this matter and will

consider any comments submitted thereon before issuing a final rule.

Drafting Information

The principal author of this document was Glen E. Vereb, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

List of Subjects in 19 CFR Part 4

Coastal Zone, Oil pollution, Vessels, Water pollution control.

Amendment to the Regulations

Part 4, Customs Regulations (19 CFR Part 4), is amended by adding a new section 4.66c to read as follows:

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

§ 4.66c Oil Pollution by Oceangoing Vessels.

(a) If a district director receives a notification from a Coast Guard officer that an order has been issued to detain a vessel required to have an International Oil Pollution Prevention (IOPP) Certificate (1) which does not have a valid certificate on board or (2) whose condition or whose equipment's condition does not substantially agree with the particulars of the certificate on board, the district director shall refuse or revoke the clearance or permit to proceed of the vessel if requested to do so by a Coast Guard officer. The district director shall not grant clearance or issue a permit to proceed to the vessel until notified by as Coast Guard officer that detention of the vessel is no longer required.

(b) If a district director receives a request from a Coast Guard officer to refuse or revoke the clearance or permit to proceed of a vessel because the vessel, its owner, operator or person in charge is liable for a fine, or reasonable cause exists to believe that they may be subject to a fine under the provisions of (1) 33 U.S.C. 1908 for violating the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL Protocol), (2) the Act to Prevent Pollution from Ships, 1980 (33 U.S.C. 1901–1911), or (3) regulations issued thereunder, such clearance or a permit to proceed shall be refused or revoked. Clearance or a permit to proceed may be granted when the district director is informed that a bond or other security satisfactory to the Coast Guard has been filed.

(Pub. L. 96–478, 94 Stat. 2297 et seq., 33 U.S.C. 1901–1911; 46 U.S.C. 91; 46 U.S.C. 313; 19 U.S.C. 1443)

William von Raab,
Commissioner of Customs.

Approved: January 12, 1984.
JOHN M. WALKER, Jr.,
Assistant Secretary of the Treasury.

[Published in the Federal Register, February 1, 1984 (49 FR 3984)]

(T.D. 84-37)

Customhouse Broker's License—Cancellation

Cancellation of Customhouse Broker's License No. 5182

Notice is hereby given that the Commissioner of Customs, on January 27, 1984 pursuant to section 641, Tariff Act of 1930, as amended (19 U.S.C. 1641), and Part 111 of the Customs Regulations, as amended (19 CFR Part 111) canceled with prejudice the individual Customhouse Broker's License No. 5182 issued to Julie D. Summers, Norco, California, for the Customs District of Los Angeles, California. This decision is effective as of January 27, 1984.

GEORGE C. CORCORAN, Jr.,
Acting Commissioner of Customs.

[Published in the Federal Register, February 1, 1984 (49 FR 4063)]

(T.D. 84-38)

19 CFR Part 133

Recordation of Trade Name: ZAHNRADFABRIK FRIEDRICHSHAFEN, AG.

AGENCY: U.S. Customs Service, Department of the Treasury

ACTION: Notice of Recordation.

SUMMARY: On October 27, 1983, a notice of application for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "ZAHNRADFABRIK FRIEDRICHSHAFEN AG." was published in the Federal Register (48 FR 49723). The notice advised that before final action was taken on the application, consideration would be given to any relevant data, views, or arguments submitted in opposition to the recordation and received not later than December 27, 1983. No responses were received in opposition to the notice.

Accordingly, as provided in section 133.14, Customs Regulations (19 CFR 133.14), the name "ZAHNRADFABRIK FRIEDRICHSHAFEN AG." is recorded as the trade name used by "Zahnradfabrik Friedrichshafen, AG., a corporation organized under the laws of West Germany, located at D-7990 Friedrichshafen 1, West Germany. The trade name is used in connection with the following

merchandise manufactured and distributed throughout the world: gear units for machines; machine parts; brake testing stands; testing instruments and parts for land vehicles.

DATE: February 6, 1984.

FOR FURTHER INFORMATION CONTACT: Harriet Lane, Entry, Licensing and Restricted Merchandise Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5765).

Dated: January 31, 1984.

DONALD W. LEWIS,
Director, Entry Procedures and Penalties Division.

[Published in the Federal Register, February 6, 1984 (49 FR 4446)]

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19 CFR Part 134, 148, 162, 171, and 172

(T.D. 84-18)

Penalties and Penalties procedures

AGENCY: U.S. Customs Service, Department of the Treasury

ACTION: Final rule; correction.

SUMMARY: This document corrects an error in a document which amended the Customs Regulations relating to penalties and penalties procedures for violations of title 19, United States Code, section 1592. The document was published in the Federal Register on Friday, January 13, 1984 (49 FR 1672).

FOR FURTHER INFORMATION CONTACT: Edward T. Rosse, Chief, Commercial Fraud and Negligence Penalties Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8317).

SUPPLEMENTARY INFORMATION:

BACKGROUND

In FR Doc. 84-829, appearing at page 1672 in the issue of Friday, January 13, 1984, on page 1683, in the first column, under the heading "(I) Customhouse Brokers," the first paragraph was incorrectly worded. Specifically, the words "or grossly negligent" should be deleted from the third and fourth lines of the paragraph so that it should read as follows:

(I) *Customhouse Brokers.*

A customhouse broker shall be subject to the above guidelines only if he is determined to have (1) committed a fraudulent violation; or (2) committed a grossly negligent or negligent violation and shared in the financial benefits of the violation to an extent over and above the prevailing brokerage fees.

Dated: January 27, 1984.

B. JAMES FRITZ,
Director,
Regulations Control and Disclosure Law Division.

[Published in the Federal Register, February 1, 1984 (49 FR 3986)]

Recent Unpublished Customs Service Decisions

The following listing of recent administrative decisions issued by the U.S. Customs Service is published for the information of Customs officers and the importing community. Although the decisions are not of sufficient general interest to warrant publication as Customs Service Decisions, the listing describes the issues involved and is intended to aid Customs officers and concerned members of the public in identifying matters of interest which recently have been considered by the U.S. Customs Service. Individuals to whom any of these decisions would be of interest should read the limitations expressed in 19 CFR 177.9(c).

A copy of any decision included in this listing, identified by its date and file number, may be obtained through use of the microfiche facilities in Customs reading rooms or if not available through those reading rooms, then it may be obtained upon written request to the Office of Regulations and Rulings, Attention: Legal Retrieval and Dissemination Branch, Room 2404, U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington, D.C. 20229. Copies obtained from the Legal Retrieval and Dissemination Branch will be made available at a cost to the requester of $0.15 per page. Requests for copies must be accompanied by payment in the appropriate amount by check or money order. The cost per ruling (number of pages multiplied by $0.15) is indicated in the right hand column listed below.

The microfiche referred to above contains rulings/decisions published or listed in the CUSTOMS BULLETIN; many rulings predating the establishment of the microfiche system, and other rulings/decisions issued by the Office of Regulations and Rulings. This microfiche is available at a cost of $0.15 per sheet of fiche. In addition, a keyword index fiche is available at the same cost ($0.15) per sheet of fiche.

Additions to both sets of fiche are made quarterly. Requests for subscriptions to the microfiche should be directed to the Legal Retrieval and Dissemination Branch. Subscribers will automatically receive updates as they are issued and will be billed accordingly.

Dated: February 1, 1984.

B. JAMES FRITZ,
Director,
Regulations Control and Disclosure Law Division.

Date of decision	Control No.	Issue	Number of pages	Cost
Please note: Prepayment is required for copies of rulings listed below.				
11-16-83	071448	Classification: Foreign nickel electroplating operations performed on exported metal components in conjunction with the assembly of certain anode and cathode electrode devices are not entitled to item 807.00 tariff treatment	3	$0.45
12-7-83	071526	Classification: Braille watches are entitled to free entry as articles specifically designed to be used by the blind, under item 960.12, TSUS.	1	.15
12-1-83	071565	Classification: P.C. board assemblies containing electronic switches and integrated circuits designed for use in video production switchers are classifiable under item 685.19, TSUS.	4	.60
11-28-83	072725	Classification: Cane or beet sugar-based decorative cake decorations classified under item 183.05, TSUS are exempt from the absolute quota restraint imposed by item 958.15, TSUS.	3	.45
11-16-83	072760	Classification: Knives with riveted rosewood handles are classifiable under item 650.19, TSUS.	2	.30
11-30-83	106316	Vessels: Vessel repair duties on the installation of new doors are not remitted because the replacement of the door is not a modification of the vessel, but is a vessel repair dutiable under 19 U.S.C. 1466.	2	.30
12-12-83	106398	Instruments of International Traffic: Gas cylinders used to transport refrigerants and other gases on vessels from the United States to foreign destinations are designated as instruments of international traffic within the meaning of 19 U.S.C. 1322(a).	3	.45
11-17-83	543144	Value: For an importer-parent who declares that it sets the prices, transaction value requires a determination that the relationship between the buyer and the seller has not influenced the price paid or payable or that a test value has been met. (19 CFR 152.103(1)(1)).	4	.60

Date of decision	Control No.	Issue	Number of pages	Cost
12-13-83	543182	Value: Watch and watchhead repair charges may be estimated in accordance with generally accepted accounted principles for purposes of item 806.20, TSUS.	2	.30
12-1-83	543211	Value: Work in process and inventory write offs involving non-imported merchandise are not part of the constructed value of the imported merchandise, therefore item 807.00 allowance is not applicable.	5	.75

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
Morgan Ford
James L. Watson
Nils A. Boe
Gregory W. Carmen
Jane A. Restani

Senior Judges

Frederick Landis

Herbert N. Maletz

Bernard Mewman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 84-2)

AMERICAN SPRING WIRE CORP., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, TREFILERIES ET CABLERIES CHIERS CHATILLON GORCY AND COMPANHIA SIDERURGICA BELGOMINEIRA, INTERVENORS

Consolidated Court Nos. 82-10-01355, 83-1-00101, 83-3-00371, 83-3-00455

Before MALETZ, *Senior Judge.*

Opinion and Order

(Dated January 19, 1984)

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, Paul W. Jameson,* and *Kathleen T. Weaver* on the brief) for plaintiffs.

Michael H. Stein, General Counsel, U.S. International Trade Commission; *Michael P. Mabile,* Assistant General Counsel, U.S. International Trade Commission (*Jack M. Simmons, III* on the brief) for defendant.

Fox, Glynn & Melamed (*Raymond F. Steckel* and *Garry P. McCormack* on the brief) for intervenor Trefileries et Cableries Chiers Chatillon Gorcy.

Wald, Harkrader & Ross (*Christopher Dunn* on the brief) for intervenor Companhia Siderurgica Belgo-Mineira.

MALETZ, *Senior Judge:* The plaintiffs in this consolidated action, representing the American steel wire strand industry, have made application for a prleiminary injunction. They ask the court to enjoin the liquidation of entries of steel wire strand from Brazil, France, Spain and the United Kingdom pending resolution of their challenge to the final negative injury determinations by the U.S. International Trade Commission (ITC or Commission). *See* 19 U.S.C. §§ 1671d(b) and 1673d(b) (1982). Those four ITC determinations were made on September 1, 1982 for Spain, *see* 47 Fed. Reg. 38,648; on December 15, 1982 for France, *see* 47 Fed. Reg. 56,213; on February 9, 1983 for the United Kingdom, *see* 48 Fed. Reg. 6,044; and on March 23, 1983 for Brazil, *see* 48 Fed. Reg. 12,143. With the exception of the United Kingdom case involving dumped steel wire strand, all the ITC determinations stemmed from affirmative findings by the Department of Commerce, International Trade Administration, that the imports were being subsidized.

Four complaints were timely filed with this court for each of the ITC determinations. In view of the commonality of issues among the four cases—whether the Commission erred in not cumulating the imports from all four countries, whether it erred in its conclusions regarding price suppression and the importance of price in general, and whether the Commission erred in assaying the impact

of the imports on the American industry—the actions were consolidated on July 25, 1983. That same day plaintiffs' request for access to confidential information was also granted, which information was provided by the Commission up to and through the middle of November, 1983. Approximately one month later, on December 19th, plaintiffs filed motions for a temporary restraining order, preliminary injunction, and judgment upon the agency record. This court denied their motion for a temporary restraining order on December 20th, and heard plaintiffs' motion for a preliminary injunction on January 4, 1984. It is to a consideration of that motion that the court now turns.

In order to prevail on a motion for a preliminary injunction, plaintiffs must show (1) that they will be immediately and irreparably injured; (2) that there is a likelihood of success on the merits; (3) that the public interest would be better served by the relief requested; and (4) that the balance of hardship on all the parties favors petitioners. *Zenith Radio Corp.* v. *United States,* 710 F.2d 806, 809 (Fed. Cir. 1983). *See also S.J. Stile Associates, Ltd.* v. *Snyder,* 646 F.2d 522, 525 (CCPA 1981); *Timken Co.* v. *United States,* 6 CIT —, 569 F. Supp. 65, 68 (1983); *AL Tech Specialty Steel Corp.* v. *United States,* Slip Op. 83-120 6 CIT — (Nov. 21, 1983). Considering for the moment the first of these four criteria, plaintiffs have submitted no affidavits and have offered no testimony to substantiate their claim of irreparable injury. Although at the hearing counsel for plaintiffs recited some Commerce Department import statistics for steel wire strand—allegedly indicating that the price for imported steel wire strand had declined in 1983—there is no indication whether that price was c.i.f., f.o.b. or the importers' sales price. Instead they rely exclusively upon the Federal Circuit's *Zenith Radio Corp.* decision for their showing of irreparable injury. The court finds plaintiff's reliance on *Zenith* misplaced.

Of critical importance in *Zenith* was that irreparable injury was conclusively presumed. *Id.* at 810. For Zenith's statutory right to obtain judicial review of the administrative agency's determination of *de minimis* dumping margins would have been without meaning since all the entries permanently affected by that determination would have been liquidated.[1] Such liquidation, then, would have effectively eliminated the *only* remedy available to Zenith to redress an incorrect review determination. *Id.* An additional factor considered significant by the Federal Circuit was that the Commission had recently determined that the domestic industry would suffer material injury if the dumping duty order was revoked. *Id.* at 811. These factors led the court to conclude that Zenith would suffer irreparable injury absent an injunction *pendente lite.*

[1] As explained by the Federal Circuit in *Zenith:*

> This result [i.e., liquidation] is required, in the absence of a preliminary injunction, by two sections of the Trade Agreements Act of 1979 [19 U.S.C. §§ 1516a(e) and 1516a(c)(1)]. * * * Once liquidation occurs, a subsequent decision by the trial court on the merits * * * can have no effect on the dumping duties assessed on entries * * * during the review period.

Id. at 810.

The essential element that sets *Zenith* and its progeny apart is their legal setting. Those cases involve judicial scrutiny of administrative reviews of outstanding antidumping and countervailing duty orders under section 751 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, 19 U.S.C. § 1675 (1982). Section 751 administrative reviews focus on a discrete time period, typically the one-year period immediately preceding the date of review and the one-year period immediately thereafter. *See* 19 U.S.C. § 1675(a)(1). Those reviews only affect the imports actually entered during that two-year period. In operation all unliquidated entries for the period prior to the administrative review are liquidated in accordance with the agency's determination of dumping margins or subsidies found to exist for that period. That determination serves as the benchmark for deposits of estimated antidumping or countervailing duties on all future entries pending the next annual section 751 review. At that next annual review actual duties are assessed on the entries coming into the United States during that one-year hiatus. They are then liquidated in accordance therewith. Judicial review of this administrative process is similarly circumscribed by these time and entry considerations.

The periodic nature of section 751 reviews highlights how singular they are in the context of injunctive relief and the Trade Agreements Act of 1979. Reviewing courts have in effect a one-year window within which to act before all entries which are the subject of the particular section 751 review have been liquidated. However, if past experience is an accurate indicator, in the normal course of events final judicial review will take far longer than that to complete. Consequently, if a petitioner satisfies the other three *Stile* criteria, *see S. J. Stile Associates,* 646 F.2d at 525, an injunction will issue. *Zenith,* 710 F.2d at 812 (Nies, J., concurring). Otherwise, if a court in this situation does not enjoin liquidation of entries pending resolution of challenges to the section 751 review then under consideration, the practical effect will be to moot the controversy and, at the same time, deprive plaintiffs of their right to judicial review of the agency's section 751 review determination. *See The Timken Co.,* 569 F. Supp. at 69. In short, a plaintiff's right to judicially challenge the agency's calculation of duties altogether vanishes once the entries which are the subject of the review are liquidated.[2]

The unique aspect of section 751 administrative reviews—their capacity for eluding judicial scrutiny because of their periodic nature—is simply not present here. This action centers on final negative injury determinations under 19 U.S.C. §§ 1671d and 1673d (1982). Those determinations, unlike their section 751 counterpart, are not transitory. They will, as a practical matter, extend *in*

[2] In this respect, injunctions issued in the section 751 review context are of the All Writs Act type, designed to preserve the reviewing court's jurisdiction, rather than of the rule 65 variety. *See AL Tech Specialty Steel Corp. v. United States,* Slip Op. 83-120 (CIT Nov. 21, 1983). *Cf. Zenith Radio Corp. v. United States,* 710 F.2d 806, 809 (Fed. Cir. 1983).

futuro, unless upset by an intervening judicial decision. And should this court ultimately reverse the Commission's negative injury determinations, antidumping and countervailing duties can still be assessed at that time on all unliquidated as well as future entries pursuant to an affirmative injury determination. Thus, unlike in the section 751 review context, plaintiffs will unquestionably have meaningful judicial review regardless of whether an injunction now issues.[3]

The difficulty with plaintiffs' argument for extending *Zenith* is that it proves too much. They advocate nothing less than a *per se* rule which would create an irrebutable presumption of irreparable harm in all cases where judicial review of agency action is concerned. Adopting their position would effectively eliminate a showing of irreparable harm as one of the four prerequisites for injunctive relief in this court. Congress certainly contemplated no such result. *See* S. Rep. No. 249, 96th Cong., 1st Sess. 253 (1979) ("the issuance of injunctive relief [suspending liquidation of entries] is truly an extraordinary measure and [such] relief should not be granted in the ordinary course of events."). What is more, considering the novelty of most issues coming before the Commission and the International Trade Administration, it will take little ingenuity on the part of competent counsel to fashion a case in which there appears to be a likelihood of success on the merits. Given this consideration, unless some line is drawn in connection with the question of irreparable harm, the issuance of injunctions in every countervailing and antidumping duty case may become virtually automatic. This would be a result which Congress obviously never intended. It would be anathema to the notion that injunctive relief is "an extraordinary measure."

The court is of the view that before issuing a preliminary injunction inquiry must first be made as to the nature of the administrative determination under judicial consideration. If it is a final agency determination under 19 U.S.C. §§ 1303, 1671d or 1673d, the party seeking injunctive relief must make some showing of immediate and irreparable injury beyond the mere invocation of *Zenith.*

In sum, the present case is clearly distinguishable from *Zenith.* In *Zenith* there would have been no unliquidated entries subject to the reach of a judicial order, thereby effectively negating judicial review rights. Here, the statutory scheme, particularly plaintiffs' right to judicial review, will not be impaired, and the merits of the action will not be mooted, even though no injunction issues.

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[3] It is true that imports of steel wire strand which are entered pending final judicial review will be liquidated. But his fact alone does not answer the question whether plaintiffs are entitled to this court's assistance in maintaining the advantage that suspension of liquidation might otherwise give them. Plaintiffs still must make some showing that injunctive relief is warranted under the four criteria of *S. J. Stile Associates, Ltd.* v. *Snyder,* 646 F. 2d 522, 525 (CCPA 1981), a showing they have failed to make insofar as irreparable injury is concerned.

Accordingly, plaintiffs having made no showing of irreparable harm by any probative evidence, their motion for a preliminary injunction is denied.

(Slip Op. 84-3)

718 FIFTH AVENUE CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 83-11-01664

Before: Restani, *Judge.*

Opinion and Order

(Dated: January 23, 1984)

RESTANI, *Judge:* This case is before the court on defendant's motion to strike plaintiff's motion for a declaratory judgment. Plaintiff's motion was filed on November 22, 1983. The motion was filed before defendant answered the complaint. (Defendant's answer is due on January 23, 1984.) On December 7, 1983, defendant moved to strike the motion for declaratory judgment as untimely.

Plaintiff seeks a declaratory judgment without allowing defendant time to answer. Rule 57, which governs declaratory judgments does not permit this. Under the rules, the earliest time the court could rule on the merits of this action is after the pleadings are closed. Court of International Trade, R. 12(c) and and R. 56. The pleadings will not be closed until the Government's time to answer has passed.[1]

Plaintiff's memorandum in support of its motion for a declaratory judgment establishes that its motion is premature. The memorandum asserts that no material issues of fact exist, and that plaintiff is entitled to relief as a matter of law. These assertions are premature. The court cannot determine whether material issues of fact exist until defendant has had the opportunity to deny the facts asserted in the complaint. The court cannot determine the controlling law until the material facts are determined.

The expediting procedure of Rule 57 does not authorize the procedure plaintiff seeks. The court can order a speedy hearing, but the rule in no way authorizes short circuiting the pleading process. The rules require the court to permit defendant to answer. Court of International Trade, R. 57 and R. 7(a). After defendant has had time to answer, plaintiff may apply for an expedited hearing.

Plaintiff's contention that the court's rules do not authorize defendant's motion to strike is unpersuasive. Defendant's motion is proper under Rule 7(f) which sets out the procedure for applying to the court for an order. The rules do not specifically refer to a motion to strike as a response to a motion for declaratory judg-

[1] Plaintiff has not sought and has not made the requisite showing for temporary relief under Rule 65.

ment, however, the motion is an appropriate means to bring the issue of timeliness before the court. "The suggestion that Rule 12 has abolished all motions not enumerated in the Rule has been termed 'ingenious but unconvincing'." *Fireman's Fund Insurance Co.* v. *Hanley,* 140 F. Supp. 206 (W.D. Mich. 1956), 2A MOORE'S FEDERAL PRACTICE par. 12.07[3] (2ed. 1983).

Plaintiff's motion for a declaratory judgment is untimely and it is stricken without prejudice. Plaintiff may make the motion as a properly denominated dispositive motion after defendant has had its opportunity to answer.

The court is aware of plaintiff's time constraints in this action and will require a strong showing of need before granting any request by defendant for an extention of time to answer.

(Slip Op. 84-4)

UNITED STATES, PLAINTIFF *v.* F.A.G. BEARINGS CORPORATION, DEFENDANT

Court No. 83-9-01314

Before: CARMAN, *Judge.*

Memorandum Opinion and Order

[Motion to dismiss denied with instructions.]

(January 25, 1984)

Richard K. Willard, Acting Assistant Attorney General; *David M. Cohen,* Director; (*A. David Lafer* and *J. Kevin Horgan* on the motion) for the plaintiff.

Whitman & Ransom, (John M. Dowd and *Andrew L. Lipps* on the motion) and *Heron, Burchette, Ruckert and Rothwell, (Thomas Rothwell* on the motion) for the defendant.

CARMAN, *Judge:* Plaintiff in this action seeks the recovery of penalties and duties, alleging the defendant filed material and false entry documents with respect to importations made between January 1, 1972 and December 30, 1978. The case is before the court on defendant's motion to dismiss Count I of the amended complaint, which alleges fraud in the preparation of the entry documents, for failure to state with sufficient particularity the circumstances constituting the fraud. *See* U.S. Ct. Int'l Trade R. 9(b). Defendant also has moved to dismiss the entire amended complaint, alleging that it fails to satisfy rule 8(a)(2), which requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Id.* R. 8(a)(2). In the alternative, with regard to Counts II through VI, the nonfraud Counts, defendant has moved for a more definite statement pursuant to rule 12(e), asserting that the allegations in these Counts are so vague that defendant cannot frame a responsive pleading.

Plaintiff indicates this action was instituted after administrative proceedings commenced by a prepenalty notice, dated April 26, 1979. These proceedings were suspended during the pendency of a related grand jury investigation of the defendant. The grand jury investigation apparently resulted in no indictment or allegation of malfeasance or nonfeasance. A penalty notice was not issued until August 23, 1983. The defendant responded to the notice by filing a petition for remission on August 29, 1983, and made an oral presentation to the United States Customs Service (Customs) on September 1, 1983. Customs issued its final decision on September 6, 1983.

Defendant had submitted three annual statute of limitations waivers during the administrative proceedings. The last of these waivers was due to expire on September 15, 1983. The original complaint was filed on September 14, 1983. The first amended complaint was filed on September 20, 1983.

Plaintiff asserts that defendant refused to grant Customs auditors access to its corporate records and thus prevented Customs from obtaining more specific information as to the approximately 27,000 entries which plaintiff contends are in question.

Count I of the amended complaint alleges fraud in a conclusory form without setting forth the circumstances constituting the fraud with any particularity. Paragraph 6 of the amended complaint merely states that "at least 14% of the merchandise * * * was falsely described." Rule 9(b) of the Court of International Trade Rules provides in part:

> Fraud, Mistake, Condition of the Mind. In all averments of fraud * * *, the circumstances constituting fraud * * * shall be stated *with particularity.*

U.S. Ct. Int'l Trade R. 9(b) (emphasis added). Compelling policy considerations are behind the fraud with particularity requirement. The rule deters the filing of malicious, or strike, suits brought solely to harass or for settlement value. It also protects defendants from unknown and unwarranted allegations of culpable misconduct and the concomitant stigma of such accusations. In a practical sense, the rule assures that a defendant will be alerted to the particular transactions in question and be able to mount an effective and meaningful defense. "Mere conclusory allegations" of fraud are precisely what the rule seeks to preclude. *Shemtob* v. *Shearson, Hamill & Co.,* 448 F.2d 442, 444 (2d Cir. 1971); *see In re Commonwealth Oil/Tesoro Petroleum Corp. Securities Litigation,* 467 F. Supp 227, 250 (W.D. Tex. 1979) ("A plaintiff in a non-9(b) suit can sue now and discover later what his claim is, but a Rule 9(b) claimant must know what his claim is when he files it."); *Todd* v. *Oppenheimer & Co.,* 78 F.R.D. 415, 419–21 (S.D.N.Y. 1978).[1]

[1] Because Rule 9(b) of the Rules of the United States Court of International Trade is identical to Rule 9(b) of the Federal Rules of Civil Procedure, authorities with respect to the latter provision are accordingly applicable.

As to Counts II through VI of the amended complaint, Counts II and IV are based upon a theory of gross negligence; Counts III and V are based upon a theory of negligence. Count VI recites the lawful duties allegedly deprived the United States by defendant. Different penalty amounts are alleged pursuant to the alternative calculation methods set forth by statute. Otherwise, Counts II through VI appear to be based upon the same factual allegations contained in Count I of the amended complaint.

Defendant maintains that these Counts fail to satisfy the requirements of Rule 8(a)(2) of the Rules of the United States Court of International Trade. Rule 8(a)(2) provides in part:

> Claims for Relief. A pleading which sets forth a claim for relief * * * shall contain * * * a short and plain statement of the claim showing that the pleader is entitled to relief * * *.

U.S. Ct. Int'l Trade R. 8(a)(2). Defendant points out that while the requirements of rule 8(a)(2) are less strict than those in fraud cases, rule 8(a)(2) still requires that a claim be set forth in sufficient detail to give fair notice of the claim asserted and enable the adverse party to answer and prepare for trial. *See Conley* v. *Gibson*, 355 U.S. 41, 47 (1957); *Joiner Systems, Inc.* v. *AVM Corp.*, 517 F.2d 45, 47 (2d Cir. 1975). As to Counts II through VI, the amended complaint must set forth a concise and plain statement with some specificity regarding the merchandise that the United States claim was entered under the alleged false documents in order to enable the defendant to answer properly and prepare for trial.

Accordingly, after consideration of the matter, it is

ORDERED that the defendant's motion to dismiss is denied; and it is further

ORDERED that within 30 days of the filing date of this order plaintiff file a second amended complaint in conformity with rule 9(b) of the rules of this court as to Count I, and in compliance with rule 8(a)(2) as to the remaining Counts; and it is further

ORDERED that if such second amended complaint is not filed within 30 days of the filing date of this order, the Clerk of the Court shall enter judgment dismissing the amended complaint.

Decisions of the
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Abstracted Prot

The following abstracts of decisions of the United S
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decisions are not of sufficient general interest to print in
to Customs officials in easily locating cases and tracing in

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED
				Item No. and Ra
P84/15	Boe, J. January 23, 1984	Commodore Consumer Products	82-10-01423	Not stated
P84/16	Boe, J. January 23, 1984	Micro Display Systems, Inc.	82-10-01422	Not stated

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Protest Decisions

DEPARTMENT OF THE TREASURY, *January 26, 1984.*

ed States Court of International Trade at New York are ers of the Customs and others concerned. Although the nt in full, the summary herein given will be of assistance ng important facts.

WILLIAM VON RAAB,
Commissioner of Customs.

SSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
and Rate	Item No. and Rate		
	Item 688.36 5.1%	Judgement on the pleadings	Philadelphia Watch bands
	Item 688.36 5.1%	Judgement on the pleadings	Philadelphia Watch bands

Decisions of the
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Abstracted Reappra

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION
R84/30	Boe, J. January 23, 1984	Uniroyal, Inc.	80-8-01292	Cost of production
R84/31	Boe, J. January 23, 1984	Uniroyal, Inc.	80-10-01787	Cost of production
R84/32	Boe, J. January 23, 1984	Uniroyal, Inc.	81-7-00836	Cost of production
R84/33	Boe, J. January 23, 1984	Uniroyal, Inc.	81-8-00997	Cost of production
R84/34	Boe, J. January 23, 1984	Uniroyal, Inc.	81-8-01001	Cost of production

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OF ION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
ction	Represented by values on schedule "A"	Agreed statement of facts	Portland, Oreg. Automotive tires
ction	Represented by values on schedule "A"	Agreed statement of facts	Portland, Oreg. Automotive tires
ction	Represented by values on schedule "A"	Agreed statement of facts	Seattle Automotive tires
ction	Represented by values on schedule "A"	Agreed statement of facts	Mobile Automotive tires
ction	Represented by values on schedule "A"	Agreed statement of facts	Houston Automotive tires

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS O VALUATI
R84/35	Boe, J. January 23, 1984	Uniroyal, Inc.	81-11-01584	Cost of produc
R84/36	Boe, J. January 23, 1984	Uniroyal, Inc.	82-6-00791	Cost of produc
R84/37	Boe, J. January 25, 1984	Allied International, Inc.	81-9-01279S	Cost of produc
R84/38	Boe, J. January 25, 1984	Allied International, Inc.	81-11-01508	Cost of produc
R84/39	Boe, J. January 25, 1984	Allied International, Inc.	82-3-00337	Cost of produc

ASIS OF LUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
production	Represented by values on schedule "A"	Agreed statement of facts	Baltimore Automotive tires
production	Represented by values on schedule "A"	Agreed statement of facts	Baltimore Automotive tires and flaps
production	Invoice unit values plus agent's commission shown on entry papers not including additions for domestic insurance, inland freight, port expenses, and extra war risk insurance	Agreed statement of facts	Los Angeles Hardwood and birch plywood
production	Invoice unit values plus agent's commission shown on entry papers not including additions for domestic insurance, inland freight, port expenses, and extra war risk insurance	Agreed statement of facts	Los Angeles Hardwood and birch plywood
production	Invoice unit values plus agent's commission shown on entry papers not including additions for domestic insurance, inland freight, port expenses, and extra war risk insurance	Agreed statement of facts	Boston Hardwood and birch plywood

R84/40	Boe, J. January 25, 1984	Allied International, Inc.	82-4-00441	Cost of production	
R84/41	Boe, J. January 25, 1984	Jimlar Corporation	82-7-00994	Export value	

on	Invoice unit values plus agent's commission shown on entry papers not including additions for domestic insurance, inland freight, port expenses, and extra war risk insurance	Agreed statement of facts	Boston Hardwood and birch plywood
	84% of difference between American selling price at $9.00/pair less 2%, net packed and export value at invoiced unit value	Agreed statement of facts	Boston Men's footwear

Appeals to U.S. Court of Appeals for the Federal Circuit

APPEAL NO. 84-726—*Bethlehem Steel Corp., et al.* v. *United States*—COUNTERVAILING DUTY INVESTIGATIONS—CERTAIN STEEL PRODUCTS—TARIFF ACT OF 1930, AS AMENDED—Appeal from Slip Op. 83-104, filed December 12, 1983.

APPEAL NO. 84-774—*AL Tech Specialty Steel Corporation, et al.*, v. *The United States of America*—STAINLESS STEEL RODS FROM FRANCE—Appeal from Slip Op. 83-119, filed on January 13, 1984.

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